NO. 48843-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

LEROY FLOYD SALSBERY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01430-1

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The State charged Leroy Salsbery (hereafter 'Salsbery') with two counts of Rape of a Child in the First Degree or in the alternative Child Molestation in the First Degree, and two counts of Child Molestation in the First Degree for incidents of sexual abuse that Salsbery committed against G.M. between June 6, 2012 and July 30, 2013. CP 157-59. Prior to trial the State moved to admit statements G.M. made to others pursuant to RCW 9A.44.120 and ER 803. CP 11-17; 18-42; 46. The State also moved to admit a video recording of G.M. describing the sexual abuse to police pursuant to RCW 9A.44.120. CP 100-31. The trial court held hearings to determine the admissibility of the statements G.M. made to others. CP 47-49; 59-63; 65-68. After hearing the evidence and argument of counsel on

the issue of the admissibility of statements G.M. made to others, the trial court entered written findings of fact and conclusions of law. CP 69-73. The trial court found the statements were admissible pursuant to RCW 9A.44.120 and allowed the State to offer statements G.M. made to PA Butler, Arlene Howard, Darcy McFarland, Elizabeth Sledge, and Detective Thad Eakins at trial. CP 69-73. The trial court also allowed statements G.M. made to her counselor, Amy Morris, to be admitted at trial pursuant to ER 803(a)(4). RP 1074-75.

The case proceeded to trial in February 2016. RP 667. The evidence at trial showed that G.M. was adopted at the age of two by Richard and Charon McFarland[1] from Russia. RP 1305. Richard McFarland, G.M.'s father, is an assistant superintendent for a school district in Oregon. RP 1303-04. G.M. lived with her parents and brother in Dallas, Oregon. RP 1310. Charon McFarland's best friend was Sharon Babcock. RP 945, 1255. Sharon Babcock lived with Salsbery. RP 959-60. As Sharon Babcock was a close family friend, G.M. knew her and would see her at gatherings, and trips she took with her mom. RP 1307-08. Sharon Babcock offered to look after G.M. and often took G.M. on overnight visits; G.M. liked going there. RP 1257, 1308-09. From 2012

[1] Due to the numerous witnesses sharing similar names and the same last name, the State refers to witnesses by their first names throughout this brief. The State intends no disrespect.

through July 2013, G.M. went over to Sharon Babcock and Salsbery's house nearly every weekend. RP 1258. Specifically, G.M. stayed with Sharon Babcock and Salsbery from June 22, 2012 through July 13, 2012, and again for a long weekend in January 2013, and another long weekend in February 2013. RP 965-66. G.M. also stayed with Sharon Babcock and Salsbery for Easter in March 2013, and then again from June 21, 2013 until July 4, 2013, and again July 12, 2013 until July 20, 2013. RP 967. Sharon Babcock and Salsbery lived in Washougal, Washington. RP 959.

G.M. was 11 years old at the time of trial, and in the 5th grade. RP 710-11. She lived with her dad, Richard, her mom, Charon, and her brother, Grant. RP 711. G.M. testified that she was there in court because Salsbery "did something bad to me." RP 713. G.M. described several times when Salsbery touched her on her "private spot," which she testified was where she went pee and what she also called her "uterus." RP 714. G.M. indicated one incident of touching happened when Salsbery wanted to take a nap with her and he started touching her private spot. RP 715. G.M. also described an incident where Salsbery and she watched TV and on the TV people were "doing the thing where you make a baby" and that Salsbery wanted to do that same thing, but with his finger instead. RP 715. G.M. described another incident wherein Salsbery put her hand inside his shorts and made her rub his penis. RP 719. G.M. also described for the

jury times when Salsbery would make her take a shower with him and touch her on her private parts and make her touch him on his private parts. RP 721-23. G.M. also described kissing Salsbery and Salsbery using his tongue to touch hers. RP 725-26. G.M. said that Salsbery told her not to tell anyone about the touching and that he would kill her if she told. RP 726.

G.M. also testified that she then told her grandmother, Arlene, her Aunt Darcy, Betty, her parents, and a police officer about what Salsbery had done. RP 729-30. G.M. indicated she told the police officer "everything that happened," and that she talked about "touching" with the police officer, Darcy, her grandmother, and Betty. RP 730.

Salsbery was then able to cross-examine G.M. about the hearsay statements she made. RP 731-66. Salsbery asked G.M. if she told her parents everything she told the jury, and if she told Betty everything she told the jury. RP 731. Salsbery also asked G.M. about whether what she told the others was the truth or a lie. RP 732. Salsbery asked G.M. if she was sure about whether she left anything out when she talked to all the people she told about the abuse. RP 732-33. Salsbery asked G.M. multiple times whether she told all those she disclosed to the truth and everything about the situation. RP 735-37; 740-41; 743-44; 745-46. Salsbery also cross-examined G.M. extensively regarding the statements she made

during a prior hearing in court. RP 737; 743; 757; 762-65. Salsbery also cross-examined G.M. about failing to disclose the abuse to someone who came to talk to her at her school about a problem she was having with her mother. RP 751.

Richard's sister, Darcy McFarland, testified about her relationship with G.M. RP 674-75. Darcy lived with her mother, G.M.'s grandmother, Arlene Howard, in Klamath Falls, Oregon. RP 673. G.M. would routinely come visit her grandmother and aunt, on holidays and over the summer. RP 675. One on such visit, in July 2013, G.M. told her grandmother and aunt that Salsbery had been sexually abusing her. RP 676, 941-42. Specifically, G.M. asked her grandmother if she would call Salsbery and ask him "to stop doing something." RP 676. When her grandmother asked her what she meant, G.M. said that Salsbery was touching her on her private parts and making her touch his private parts. RP 676. G.M. said it hurt and it was uncomfortable. RP 678. G.M.'s grandmother, Arlene, stressed during this conversation that it was important for G.M. to tell the truth, and G.M. said she was telling the truth. RP 678. G.M. told her grandmother and aunt that Salsbery told her this was their secret. RP 682. G.M. also indicated that Salsbery had made her watch "yucky movies." RP 683. G.M. described the "yucky movies" as ones in which people were doing things with their private parts. RP 943. Arlene also remembered

G.M. telling her and Darcy that G.M. took showers with Salsbery. RP 942. G.M. wanted her grandmother to get Salsbery to stop touching her because she wanted to go live with Salsbery and his wife. RP 942. After hearing G.M.'s disclosure, Arlene talked to G.M.'s father, Richard and G.M. was taken to her father the following day. RP 690, 944.

Richard was very upset upon hearing about the abuse. RP 944, 1309-10. He was at work when he learned about what G.M. had told his mother, and he immediately called a close friend, Betty Sledge, and met her to talk to her about what he should do. RP 1311. Betty is a good family friend that the McFarlands had known for fifteen years. RP 1304. She had worked as a mental health counselor, and Richard trusted her as a confidant. RP 1304, 1310. After meeting Betty, Richard and his wife, Charon McFarland, drove to meet his sister, Nancy, to pick G.M. up about halfway between where G.M. was staying with her grandmother and aunt, and where Richard and Charon McFarland lived in Dallas, Oregon. RP 1264, 1310-11. The adults decided that G.M. would go spend that night with Betty. RP 1311. Between picking G.M. up and taking her to Betty's house, Richard and Charon did not ask G.M. any questions about what she had disclosed to her grandmother and aunt. RP 1312.

Betty testified that she met Richard McFarland in 2002 when she began working at the school for which he was the principal. RP 772. She

and Richard and Charon McFarland became friends. RP 772-73. Betty became close with G.M.; she saw her routinely at church and then G.M. would spend some nights with Betty from time to time starting at age six or seven. RP 773. At the time of trial Betty was working as a case manager and mental health therapist in Polk County, Oregon. RP 772. On July 25, 2013, Betty got a call at work from Richard. RP 776. Richard said something terrible had happened and that he needed to see Betty right away. RP 776. Betty arranged to leave work and met Richard at a Dairy Queen in town. RP 776. Richard was crying and appeared distressed. RP 776-77. Richard then went to pick up G.M. and he then brought G.M. to Betty's house to spend the night. RP 778.

That evening, Betty was in a recliner in her living room watching TV and G.M. climbed up and sat with Betty, and started talking to her. RP 779. G.M. told Betty, "I told my grandmother something. I told my grandmother something." RP 779. Betty described that it was then as if a floodgate had opened, and G.M. told her about how Salsbery had been touching her. RP 779-80. Betty wanted to make sure she remembered what G.M. was telling her, so she suggested they go into Betty's office and Betty took notes of what G.M. said. RP 780. Betty testified that G.M. told her that Salsbery touched her on the privates about ten times. RP 785. G.M. described it happening the last time she stayed with him, about

watching "gross movies with naked people in it" and about Salsbery taking off G.M.'s shorts and underwear and touching her. RP 785. G.M. told Betty that Salsbery asked her if it felt good and G.M. told him it hurt. RP 785. G.M. described to Betty that Salsbery would use his finger to put it inside her private part up to his first knuckle. RP 785. G.M. described that Salsbery asked G.M. to kiss his private parts, but she refused. RP 786. Salsbery then took G.M.'s hand and made her touch him on his private part. RP 786. G.M. also described taking a shower with Salsbery, wherein he made her wash his private parts with her hand and his private part started to stick out. RP 786. G.M. told Betty "every time I took a shower with him, I would have to wash everything on him, his hair, his private, his feet, everything. Then he would wash me, and put soap on his hand, and put his hand in my private and rub hard." RP 787. G.M. also described a time when Salsbery asked G.M. if she wanted to watch TV and she suggested watching Barbie, but instead Salsbery put a movie on where people were kissing while naked, and they put their private parts together. RP 787. During that incident, Salsbery took G.M.'s pants and underwear off and touched her on her private part. RP 787. G.M. tried to get away, but Salsbery held on to her legs. RP 787. G.M. also described times when Salsbery would use his tongue to touch G.M.'s tongue when he kissed her. RP 788.

The day after G.M. spent the night with Betty, she went with her dad, Richard, and Betty to meet with police officers in Washougal, Washington. RP 1315. There they met with Detective Thad Eakins. RP 797-99, 1315. G.M. also went to a local hospital to be examined. RP 1315. Det. Eakins also interviewed Richard and Betty that same day. RP 799, 1424-25. After G.M. was examined at the hospital, Det. Eakins interviewed her about the allegations involving Salsbery. RP 1426-27. Det. Eakins has been trained in performing forensic interviews and has experience in doing them. RP 1426-27. He performed his interview with G.M. in accordance with his training and experience. RP 1427. A video recording of Det. Eakins' interview with G.M. was admitted into evidence as Exhibit 29 and played for the jury. RP 1439-85; EX. 29.

As part of his investigation, Det. Eakins visited Sharon Babcock and Salsbery's residence, located in Washougal, Washington. RP 1429-31. Det. Eakins saw their living room and observed the brown recliner referred to by G.M., and a TV in the living room. RP 1430. Det. Eakins confirmed that Sharon Babcock and Salsbery subscribed to DIRECTV and had access to premium channels like HBO, Cinemax, Showtime, etc., between October 2012 and January 2013, and that those channels had access to pornography. RP 1435-36.

After meeting with Det. Eakins, Richard looked at his calendar to gather dates when G.M. was visiting Sharon Babcock and Salsbery to provide to Det. Eakins for the investigation. RP 1318. Richard described one event when Sharon Babcock and Salsbery came to stay with Richard's two children, G.M. and her brother, while he and his wife Charon McFarland went to the coast for two nights to celebrate their anniversary. RP 1319-20. This was in December 2012. RP 1319-21. When Richard and Charon McFarland returned to their home, only Sharon Babcock and their son were there. RP 1321. They were told that Salsbery had taken G.M. with him back to Washougal, Washington to stay. RP 1322.

Richard recalled G.M.'s last visit with Salsbery was from July 12 – 20, 2013. RP 1323. During that week, G.M. stayed with Sharon Babcock and Salsbery at their home in Washougal, Washington. RP 1323. From Salsbery's house, G.M. went straight to her grandmother and aunt's house in Klamath Falls, Oregon. RP 1326.

Charon McFarland found some things Salsbery said to her about G.M. odd in the months leading up to G.M.'s disclosure. RP 1275. At one time, Salsbery offered Charon McFarland $25,000 if he and Sharon Babcock could have G.M. RP 1275.

On August 22, 2013, G.M. went to Liberty House, a child abuse assessment center located in Salem, Oregon, to be evaluated by Kathy

Butler, a Physician's Assistant. RP 871-76. At that time, Kathy Butler performed a sexual assault examination on G.M., and talked to G.M. about the incidents of abuse with Salsbery. RP 876-80. G.M. told Kathy Butler that Salsbery had kissed her on the mouth, had made her touch his "personal part" in the shower, and that Salsbery had touched her on her "personal part" and that he touched it "to his first knuckle." RP 880-83.

Richard testified that after the disclosure of abuse, G.M. seemed to become more oppositional and less easygoing. RP 1328. She became frustrated quicker and had more anger. RP 1328. Charon McFarland testified that G.M. was confused and upset after her disclosure about Salsbery, had trouble sleeping, and even said she wanted to get rid of some stuffed animals and toys Salsbery had given her because they reminded her of him. RP 1271-72. G.M.'s parents decided they would take G.M. to see a counselor because she had a lot to talk about and was upset by the things that had happened to her. RP 1267. They took her to see Amy Morris, a counselor. RP 1268. Charon McFarland met with Amy Morris and discussed the issues and their goals for counseling and she provided G.M.'s history, including the fact that Charon McFarland and G.M. had a hard time bonding and that G.M. did not get along with her brother. RP 1268-69.

Amy Morris is a mental health counselor at Poyama Counseling Services in Salem, Oregon. RP 1102. Amy Morris received her undergraduate degree in Psychology from Willamette University in 1999 and then obtained a Master's in counseling from George Fox University in 2005. RP 1104. She is a licensed professional counselor in the State of Oregon. RP 1104. Amy Morris has had extensive training with children around sexual abuse trauma. RP 1104-05. In her professional capacity, Amy Morris treated G.M. starting in August 2013 for numerous issues. RP 1106-07. G.M.'s mother, Charon McFarland, brought G.M. to see Amy and provided her with G.M.'s background and what Charon McFarland believed the issues were, including how she got along with her brother, other behaviors in the home, and recent sexual abuse. RP 1108-10. Amy began seeing G.M. and during their counseling sessions G.M. disclosed some incidents of sexual abuse involving Salsbery. RP 1120-33. Specifically, G.M. told Amy about sitting on Salsbery's lap watching "gross movies." RP 1122. G.M. said that Salsbery touched her private parts while sitting in the recliner with him. RP 1122. G.M. also told Amy about Salsbery touching her on her private parts during a shower, and putting his fingers inside her vagina. RP 1124. G.M. also described to Amy that Salsbery would have her touch his penis and rub it. RP 1126. At one point G.M. expressed her fear to Amy that she would be in trouble if

she told about what was happening with Salsbery, and she also indicated that Salsbery told her that no one would believe her if she told. RP 1128, 1133.

Amy Morris discussed post-traumatic stress disorder (PTSD) and how she believed G.M. suffered from it. RP 1135. Amy testified to the symptoms of PTSD and how that manifests with a child, and what symptoms she saw in G.M. RP 1135-36.

Salsbery presented his own expert witness, Dr. Kirk Johnson at trial. RP 1636-1738. Dr. Johnson testified he reviewed Amy Morris's case notes and from those did not agree with her diagnosis of PTSD for G.M. RP 1639-45, 1652-53. Dr. Johnson did not meet G.M., talk to her, evaluate her or treat her. RP 1698-99. Dr. Johnson discussed the symptoms of reactive attachment disorder and how G.M. showed symptoms of that disorder. RP 1657-76. Dr. Johnson posited that a diagnosis of reactive attachment disorder was more appropriate for G.M. than a diagnosis of PTSD. RP 1698.

During closing arguments, the State discussed and played the video recording of G.M.'s interview with Det. Eakins, which had been admitted as exhibit 29, for the jury. RP 1916-56. The jury returned verdicts of guilty for two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree. CP 286-89. The jury also made

special findings that Salsbery used a position of trust or confidence to facilitate the commission of the crimes charged in counts 1-4. CP 290-93. The trial court sentenced Salsbery pursuant to RCW 9.94A.507 to a minimum term of 279 months and a maximum term of life. CP 350. Salsbery timely filed this appeal.

ARGUMENT

I. The trial court did not err in admitting video of the victim's conversation with police and allowing it to be played during closing arguments.

Salsbery argues the trial court improperly admitted video of the victim's prior conversation with police pursuant to RCW 9A.44.120 because admission of the evidence allowed the State to replay the video during closing arguments. Salsbery relies entirely upon case law that discusses replaying testimony of witnesses from trial, or reading of transcripts of trial testimony to the jury during deliberations. These cases are inapposite to Salsbery's claim as the trial court did not replay any witness's testimony from trial during closing arguments or jury deliberations. Instead, the trial court admitted an exhibit offered by the State and properly allowed the parties to use exhibits during closing arguments. The trial court did not err in admitting this video and the

playing of the video to the jury during closing argument did not deny Salsbery a fair trial. His claim is without merit.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (citing *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995)). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *Castellanos,* 132 Wn.2d at 97. Specifically, our Courts have held that "decisions regarding the admission of exhibits as evidence [are] within the sound discretion of the trial court and [will] not be disturbed on review absent a showing of abuse of discretion." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Generally, exhibits that are admitted into evidence are properly sent to the jury room with the jury and the jury may inspect the exhibits as they see fit. CrR 6.15(e); *Castellanos*, 132 Wn.2d at 97. A jury may take audiotape or videotape recorded exhibits into deliberations and review them "if, in the sound discretion of the trial court, the exhibits are found to bear directly on the charge and are not unduly prejudicial." *State v. Frazier,* 99 Wn.2d 180, 189, 661 P.2d 126 (1983);

State v. Gregory, 158 Wn.2d 759, 847–48, 147 P.3d 1201 (2006) (applying the same principles provided for audiotapes to videotapes).

In *Castellanos*, the trial court allowed admission of a tape recording into evidence. The jury had access to the recording and a tape player during deliberations. *Castellanos*, 132 Wn.2d at 97. The defendant argued on appeal that unrestricted access to the recordings during deliberations created a danger that the jury would give undue emphasis to the recordings. *Id.* at 98. Our Supreme Court specifically rejected this argument. *Id.* Once an item has been admitted into evidence, the jury, and the parties during arguments, may use the evidence in the fashion they choose. *See State v. Elmore,* 139 Wn.2d 250, 296, 985 P.2d 289 (1999). In *Castellanos*, the Court likened allowing a jury to have a tape player to listen to an admitted recording akin to allowing jurors to use their eyeglasses to be able to read an admitted document. *Castellanos,* 132 Wn.2d at 98. It is undisputed that the parties may use exhibits during closing arguments and argue the evidence that was admitted, either as testimony or exhibits, to the jury. There would be no argument the trial court erred had the State held up a photo that had been admitted into evidence of an assault victim during closing argument, or if the State had held up a no contact order that had been admitted in a trial for the violation of said no contact order. The State is reasonably allowed to use

exhibits admitted at trial during its closing argument, just as it is allowed to highlight portions of witnesses' testimony and argue the admitted evidence, and reasonable inferences the jury can draw therefrom. There was no error in allowing the recording of the victim's interview with police to be admitted as an exhibit and for it to be used by the State during its closing argument.

Furthermore, the State did not use the recording in an inappropriate way to appeal to the passions or prejudices of the jury, or to ask the jury to convict on any improper basis. The State played the recording once during closing arguments and properly argued this evidence to the jury. Furthermore, the cases on which Salsbery relies to support his argument are unhelpful. Salsbery cites to cases in which the jury asked to have the testimony of witnesses from trial replayed during their deliberations. That situation is significantly different from a party using an admitted exhibit during closing argument. The cases more on point to the situation at issue here are those cases which dealt with how a jury can or should be allowed to play a recording that has been admitted as an exhibit during their deliberations. *See State v. Frazier*, 99 Wn.2d 94, 61 P.2d 126 (1983), *State v. Castellanos*, *supra*, and *State v. Elmore, supra.* As discussed above, these cases found the trial courts did not abuse their discretion in allowing the jury access to the exhibits during deliberations. As our trial court

below would not have erred in allowing the jury to replay the victim's interview with police on a DVD player during their deliberations (*see Frazier, supra, Castellanos, supra*, and *Elmore, supra*), the trial court did not err in allowing the State and defense to reference and play the admitted recording during closing arguments. Salsbery has not shown that the trial court abused its discretion in admitting this exhibit and allowing the State to use the exhibit during closing as it is allowed to use all exhibits. Salsbery's argument fails.

II. The trial court did not prevent Salsbery from presenting a defense.

Salsbery argues that he was prohibited from presenting a defense because the trial court refused to allow Salsbery's expert to discuss certain alleged prior bad acts of G.M.'s. Specifically, Salsbery wished to introduce evidence that G.M. was physically aggressive towards her mother, brother, and animals, that G.M. told someone she wanted to stab her parents, and that her mother physically abused her. RP 1604-05. The trial court properly found this evidence inadmissible as irrelevant and unduly prejudicial. Salsbery was not prohibited from presenting a defense and the trial court did not err in prohibiting presentation of improper character evidence.

"'A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.' But "'a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.'" *State v. Rafay*, 168 Wn.App. 734, 794-95, 285 P.3d 83 (2012) (quoting *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992) and *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004)). Salsbery frames this specific issue as one of being prohibited from presenting a defense. However, a criminal defendant also must follow the evidence rules, and evidence that does not meet the requirements of ER 404(b), ER 403, or other applicable evidence rules is not rendered admissible simply because a defendant claims it supports his theory of the case. At the trial court level below, the trial court excluded the evidence Salsbery moved to admit as irrelevant and unduly prejudicial. It is clear from the record that Salsbery hoped only to admit evidence of what he saw as G.M.'s bad character in order to convince the jury she was a bad person. This is the kind of evidence generally prohibited by our evidence rules.

Salsbery was not prohibited from presenting his defense. He claims in this appeal that his theory of the case was that G.M. suffered from reactive attachment disorder and not PTSD. Salsbery further argues that he was specifically prohibited from having his expert testify that G.M.

suffered from behaviors that were indicators of reactive attachment disorder. Br. of Appellant, p. 28. However, Salsbery presented evidence that G.M. suffered from reactive attachment disorder and not PTSD and his expert specifically opined that G.M.'s behaviors were more in line with reactive attachment disorder than PTSD. Salsbery's expert, Dr. Johnson, testified that he did not agree with G.M.'s therapist's diagnosis of PTSD and that he believed many of G.M.'s symptoms were consistent with reactive attachment disorder. Furthermore, Salsbery cross-examined the State's expert witness extensively about reactive attachment disorder. RP 1194-1200. Salsbery showed that G.M. suffered several symptoms that were consistent with reactive attachment disorder, and showed the jury that even G.M.'s therapist could not say whether the cause of her symptoms was PTSD or some other potential disorder, including reactive attachment disorder. RP 1197. Salsbery was allowed to present his defense at trial, he was simply prohibited from admitting irrelevant evidence. Salsbery had no constitutional right to present inadmissible, irrelevant, and prejudicial evidence at trial. The trial court did not err in precluding admission of this evidence.

III. Salsbery's right to confrontation was not violated.

Salsbery argues that his right to confront the victim was violated because her direct testimony was not sufficiently developed by the State

when she took the stand and therefore the admission of statements she made to others describing the sexual abuse pursuant to RCW 9A.44.120 denied him his right to confront her. The victim testified about the abuse, was available to be cross-examined, was in fact cross-examined by Salsbery at trial, and therefore Salsbery did have a full opportunity to confront the witness against him. Salsbery's argument that the direct testimony was not sufficient to allow full confrontation fails.

The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." U.S. Const. amend VI. In *California v. Green,*399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), the U.S. Supreme Court held that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Green,* 399 U.S. at 158. The purposes of the confrontation clause are to ensure that the witness's statements are given under oath, to force the witness to submit to cross-examination, and to permit the jury to observe the witness's demeanor. *Id.* The *Green* Court held that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between

his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." *Id.* at 164, 90 S.Ct. 1930.

In *Delaware v. Fensterer,* 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985), the Court explained that the Confrontation Clause does not guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. Instead, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony. *Id.* at 21–22, 106 S.Ct. 292. Essentially, when defense has an opportunity for full cross-examination of the declarant about the out-of-court statements, there is no confrontation issue when out-of-court statements are admitted at trial.

In *State v. Rohrich,* 132 Wash.2d 472, 939 P.2d 697 (1997), our state Supreme Court evaluated statutory and confrontation clause challenges where a child victim took the stand at trial but was not asked and did not answer any questions relating to the events alleged in the child's prior out-of-court statements. *Rohrich,* 132 Wn.2d at 474. The Court discussed the general preference for live testimony and emphasized

the central role of cross-examination in ascertaining the truth. *Id.* at 477–78, 939 P.2d 697. The court reasoned,

> The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses. In this context, "not only [must] the declarant have been generally subject to cross-examination; he must also be subject to cross-examination concerning the out-of-court declaration." The State's failure to adequately draw out testimony from the child witness before admitting the child's hearsay puts the defendant in "a constitutionally [unacceptable] Catch–22" of calling the child for direct or waiving his confrontation rights.

Id. at 478 (footnotes and citations omitted) (quoting *United States v. West,*670 F.2d 675, 687 (7th Cir.1982) and *Lowery v. Collins,* 996 F.2d 770, 771–72 (5th Cir.1993)). Thus, the court held that the confrontation clause required the child to give "live, in-court testimony describing the acts of sexual contact to be offered as hearsay." *Id.* at 482. The hearsay declarant, G.M., was available as a witness, and did testify about the substance of her out-of-court statements and about to whom she discussed the matter. Salsbery's argument that he was denied his right to confront G.M. is wholly without merit.

G.M. testified about the details of the incidents of the sexual molestation during her direct examination. RP 709-28. G.M. also testified that she told her grandmother, Arlene Howard and Darcy about what

evidence admits the truth of the State's evidence. *State v. Pacheco*, 70 Wn.App. 27, 38-39, 851 P.2d 734 (1993), *rev'd on other grounds*, 125 Wn.2d 150, 882 P.2d 183 (1994). All reasonable inferences from the evidence must be drawn in favor of the State. *Salinas*, 119 Wn.2d at 201. This Court also defers to the jury's resolution of conflicting testimony, evaluation of the credibility of witnesses, and its view on the persuasiveness of the evidence. *State v. Lubers*, 81 Wn.App. 614, 619, 915 P.2d 1157 (1996). This Court should affirm the convictions if any rational trier of fact could have found the essential elements of the crime. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence is as probative and reliable as direct evidence, and the State may rely upon both in presenting its case. *State v. Kroll*, 87 Wn.2d 829, 842, 558 P.2d 173 (1976); *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880 (1991); *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977).

To prove Salsbery committed the crime of Rape of a Child in the First Degree, the State had to prove that Salsbery had sexual intercourse with G.M., a child under the age of 12, to whom Salsbery was not married, and that Salsbery was at least 24 months older than G.M. RCW 9A.44.073. Salsbery contends on appeal that the State did not present sufficient evidence that Salsbery's finger penetrated G.M.'s vagina as is required to prove sexual intercourse. Sexual intercourse occurs upon

penetration, "however slight" of the victim's vagina. RCW 9A.44.010(1)(b). "[I]t is not necessary that the penetration should be perfect, the slightest penetration of the body of the female by the sexual organ of the male being sufficient; nor need there be an entering of the vagina or rupturing of the hymen; the entering of the vulva or labia is sufficient." *State v. Snyder*, 199 Wn. 298, 301, 91 P.2d 570 (1939). The State's burden is to show that there was any penetration, *however slight*, into G.M.'s vaginal area. The State proved this through substantive evidence from multiple witnesses.

Salsbery seems to argue that because G.M., a young child, did not testify on the stand at trial about how much penetration occurred, that he should be given the benefit of the doubt and that this Court should find no evidence was presented that any penetration did occur. However, in a challenge to the sufficiency of the evidence, all the evidence is viewed in the light most favorable to the State; the truth of the State's evidence is admitted, and all reasonable inferences are drawn in favor of the State. *See infra*. The State presented evidence of G.M.'s prior statements to others describing the sexual assaults perpetrated against her by Salsbery pursuant to RCW 9A.44.120. This evidence is substantive and is given as much weight as the finder of fact chooses to give it. Thus, when this evidence, that G.M. told others that Salsbery put his finger inside her vagina, is

viewed in the light most favorable to the State, it is clearly sufficient to support the Rape of a Child convictions. Though Salsbery may think the evidence is weak, the evidence established that G.M. claimed Salsbery penetrated her with his finger up to his first knuckle. RP 785, 880-83, 1124. This evidence is sufficient for a reasonable jury to have found that any penetration, however slight occurred. Thus the State presented sufficient evidence to support Salsbery's convictions for rape of a child. His claim lacks any merit and should be denied.

V. Cumulative Error did not deny Salsbery of a fair trial.

Salsbery argues cumulative error denied him a fair trial. As discussed in each of the preceding sections, Salsbery has not shown any error below, let alone cumulative error that together affected the outcome of his trial.

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens,* 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The cumulative error doctrine does not provide relief where the errors are few and had little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As

discussed above, Salsbery failed to show error, or how each alleged error affected the outcome of his trial. Further, Salsbery has not shown how the combined error affected the outcome of his trial. Accordingly, Salsbery's cumulative error claim fails.

CONCLUSION

Salsbery has not shown any valid claim for relief from his convictions for raping and molesting G.M. His convictions and sentence should be affirmed in all respects.

DATED this 11 day of September, 2017.

Respectfully submitted:

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